Supreme Court, U.S.
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No. 99 379

IN THE

Supreme Court of the United States

BARRY T. SULLIVAN,

Petitioner,

v.

NATIONAL RAILROAD PASSENGER CORPORATION,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Whether the Eleventh Circuit erred in substituting its own judgment for that of the jury, thereby overturning a $606,949 verdict and judgment for Petitioner, and expressly requiring proof of discrimination in addition to: (1) a *prima facie* case; and (2) the jury's rejection of the employer's proffered legitimate business reason in order for a plaintiff to prevail in a Title VII action, contrary to this Court's decision in *Hicks v. St. Mary's Honor Center* and the decisional law of the Third, Sixth, Seventh, Tenth, and District of Columbia Circuits.

PARTIES TO THE PROCEEDING

The petition accurately lists the parties to the proceeding.

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OPINIONS BELOW

The opinion and judgment of the United States Court of Appeals for the Eleventh Circuit is reported at *Sullivan v. National Railroad Passenger Corporation*, 170 F.3d 1056 (11th Cir. 1999) (App. A). The order and final judgment of the United States District Court for the Southern District of Florida is unreported (App. B).

STATEMENT OF JURISDICTION

This Petition for Writ of Certiorari is based upon the United States Court of Appeals for the Eleventh Circuit's decision overturning a jury verdict and judgment in the amount of $606,949 in favor of Petitioner Barry T. Sullivan, in which the Eleventh Circuit substituted its own judgment for that of the jury and expressly required proof of discrimination in addition to: (1) Petitioner's *prima facie* case; and (2) the jury's rejection of the Respondent employer's proffered legitimate business reason for its adverse employment action before Petitioner could prevail. The Eleventh Circuit's decision was rendered on March 26, 1999 (App. A). Petitioner timely filed a Petition for Rehearing and Rehearing *En Banc*, which was denied by the Eleventh Circuit on June 3rd, 1999 (App. D).

This Court has certiorari jurisdiction pursuant to 28 U.S.C. § 1254(1). Certiorari is particularly appropriate where, as here, the United States Courts of Appeals are split on the issue presented.

STATUTORY PROVISIONS INVOLVED

The statute involved in this case is Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(a), which provides as follows:

> It shall be an unlawful employment practice for an employer —
>
> (1) to . . . discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's sex. . . .

42 U.S.C. § 2000e-3 provides:

> It shall be an unlawful employment practice for an employer to discriminate against any of his employees . . . because he has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter.

STATEMENT OF THE CASE

This Petition for Writ of Certiorari arises out of a lawsuit brought by Petitioner Barry T. Sullivan against the Respondent National Railroad Passenger Corporation ("Amtrak"), based on gender discrimination in the form of *quid pro quo* sexual harassment by a male supervisor and retaliation, both pursuant to Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e, *et seq.* Jurisdiction was based upon 28 U.S.C. § 1331.

Petitioner's claim stemmed from an incident in December 1993 when Sullivan's immediate supervisor, Kevin Scott, allegedly sexually propositioned him in a hotel parking garage (App. A at 2a).[1] Sullivan did not report this incident to anyone at Amtrak until February 1994, after he had been demoted from his job as manager during a corporate reorganization. In approximately February 1994, Sullivan's attorney lodged a complaint with Amtrak on Sullivan's behalf, claiming that the incident with Scott in December 1993 constituted unlawful sexual harassment (App. A at 3a). Amtrak officials investigated the complaint and concluded that the incident had not in fact occurred (App. A at 3a). In June 1994, Scott changed Sullivan's work schedule from four to five days per week (App. A at 3a). Amtrak claimed that this change was necessary to satisfy a Food & Drug Administration ("FDA") regulation that all inbound trains be inspected and cleaned upon arrival (App. A at 3a). In July 1994, Amtrak, through a committee on which Scott sat, eliminated Sullivan's yard chief position (App. A at 3a). Throughout 1995, Sullivan unsuccessfully applied for a number of different management positions including: Director of OBS Station Support (January, 1995); Product Line Director (March, 1995); Manager of Terminal Services, Miami (March, 1995); Manager of Terminal Services, New Orleans (May, 1995); Conventional Services Manager, Northeast Corridor (April, 1995) (App. A at 3a-4a).

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1. The facts presented are derived from the appellate court's opinion, supplemented with additional record evidence. "App." references are to the Appendix materials attached hereto. "Tr." references are to the trial transcript. "R." references are to the certified Record on Appeal transmitted to the Eleventh Circuit from the district court. The first numeral is to the volume; the second to the docket number; and the third to the page numbers within the document, if applicable.

Sullivan filed suit against Amtrak in February 1995, and amended his complaint in June 1995 to include charges that Amtrak had retaliated against him by, *inter alia*, rejecting him for all of the other management positions for which he applied (App. A at 4a).

The case was tried to a jury in May 1997. The jury returned a verdict finding for Amtrak on the underlying claim of sexual harassment, but finding for Sullivan on the retaliation claim (App. C at 24a). Following the jury's verdict granting judgment for Sullivan and $60,000 in compensatory damages, the trial court held a hearing on the matter of equitable damages and issued a final judgment in the amount of $606,949 which included the compensatory damages awarded by the jury, plus back pay and front pay in lieu of reinstatement (App. B at 21a-22a). Amtrak took an appeal from that judgment, and, following oral argument, the United States Court of Appeals for the Eleventh Circuit reversed the jury's verdict (App. A at 12a).

In reversing the jury verdict for Sullivan on the retaliation claim, the court of appeals impermissibly substituted its judgment of the evidence for that of the jury. Thus, with regard to the product line director position, the court of appeals found that there was no evidence in the record to rebut the "decisionmaker" Al Edelston's testimony that he did not know of Sullivan's complaint or to show that Amtrak's reasons for hiring Dennis Hale instead were pretextual. However, there is ample evidence in the record to "rebut" Edelston's testimony. Indeed, right after he heard about Sullivan's allegation from Amtrak's legal counsel, Joanna Moorehead, Kevin Scott personally told Edelston

about it (R. 12-158-70-72).[2] Moreover, Edelston himself testified that the decision whether to grant someone an interview for the position was made only after consultation with John Stafford, Amtrak's Director of Human Resources, who admittedly was acutely aware of Sullivan's claim against Scott (R. 9-146-150-151; R. 11-157-44). In fact, Edelston testified that Stafford was helpful in making the decision as to whom to interview for the product line director position (R. 11-157-44). Additionally, Sullivan presented substantial evidence with which the jury could compare the qualifications of Sullivan with those of Hale in an effort to determine whether Amtrak's explanation that Hale was the better qualified for the product line director position was in fact believable (Tr. 5/27-120-122).

With regard to the manager of terminal services position (New Orleans), for which James Turngren was hired over Sullivan, the court of appeals did not, nor could it, question the fact that the decisionmaker, Charles Bothwell, was aware of Sullivan's complaint (R. 12-158-72). Significantly, the court even acknowledged that Bothwell provided no direct testimony as to why Turngren got the job over Sullivan. In addition, Stafford testified that Turngren's former position just prior to his selection as manager of terminal services was lower than the original district manager position from which Amtrak had demoted Sullivan in January 1994 (R. 9-146-134). Significantly, Stafford was again instrumental in the process of deciding who was going to get interviewed for the position, actually interviewing, helping sift through the candidates, and deciding who should ultimately be selected (R. 11-157-63). With regard to the

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2. The record reflects Mr. Edelston's first name incorrectly as "Stan" (R. 12-158-72).

position for which Amtrak promoted Scott Weddle, Stafford testified that it was he who made the hiring recommendation (R. 9-146-136).

Despite all of the foregoing evidence, however, the Eleventh Circuit simply concluded: "[Sullivan] failed to introduce any evidence that would have permitted the jury to legitimately draw the inference that the reasons proffered by Amtrak for Sullivan not getting these jobs were false **and that the real reason was retaliation** [emphasis added]" (App. A at 12a).

The court of appeals, in so holding, essentially deprived the jury of its role as the finders of fact, with the ability to infer unlawful retaliatory discrimination from its rejection of Amtrak's proffered reasons for its failure to promote Sullivan, in clear conflict with this Court's holding in *St. Mary's Honor Center v. Hicks*, 509 U.S. 502 (1993), and the decisional law of the Third, Sixth, Seventh and District of Columbia Circuits, as well as the prior decisional law of the Eleventh Circuit.

REASONS FOR GRANTING THE WRIT

To establish a *prima facie* case of employment discrimination/retaliation pursuant to Title VII, particularly where the evidence, as in the instant case, is circumstantial, the plaintiff must satisfy the by now familiar requirements of *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), which allocates the burdens of production and proof as follows: The plaintiff must first establish by a preponderance of the evidence a *prima facie* case of discrimination, which itself is a fluid standard not subject to rigid interpretation but highly individualized to the particular facts of any given

case.[3] Once the plaintiff has met the burden of establishing his *prima facie* case, the burden of production shifts to the defendant to evidence a non-discriminatory reason for its adverse employment actions. This Court, in *St. Mary's Honor Center v. Hicks*, 509 U.S. 502 (1993), held in no uncertain terms that once the defendant satisfies that burden of production, the presumption of discrimination established with the evidencing of the *prima facie* case is no longer required and therefore drops out; instead, the plaintiff must prove that the employer's proffered non-discriminatory reason is a pretext.

In further clarifying the *McDonnell Douglas* analysis, this Court stated in *Hicks*, 509 U.S. at 510 [emphasis added]:

> The defendant's "production" (whatever its persuasive effect) having been made, the trier of fact proceeds to decide the ultimate question: whether plaintiff has proven "that the defendant intentionally discriminated against [him]" . . . [citation omitted]. **The factfinder's disbelief of the reasons put forward by the defendant (particularly if disbelief is accompanied by a suspicion of mendacity) may, together with the**

3. In a classic retaliation case, the elements are: (1) that plaintiff engaged in protected expression; i.e., he reasonably and in good faith complained of what he perceived to be an unlawful employment practice; (2) adverse employment action was taken against him, i.e., failure to promote to a management slot for which he was qualified, eliminating his job, or subjecting him to more onerous working conditions; and (3) that the two are not causally unrelated. (App. A at 6a); *Olmstead v. Taco Bell Corp.*, 141 F.3d 1457, 1460 (11th Cir. 1998); *Raney v. Vincent Guard Service*, 120 F.3d 1192, 1196 (11th Cir. 1997).

> **elements of the *prima facie* case, suffice to show intentional discrimination. Thus, rejection of the defendant's proffered reasons will *permit* the trier of fact to infer the ultimate fact of intentional discrimination, [footnote omitted] and the Court of Appeals was correct when it noted that, upon such rejection, "[n]o additional proof of discrimination is *required*".** . . . [citation omitted] [emphasis in original].

The Third, Sixth, Seventh, Ninth, Tenth, Eleventh, and D.C. Circuits have all faithfully followed this Court's holding in *Hicks* that a jury's finding the reasons articulated for a challenged employment action unworthy of credence, coupled with the *prima facie* case, is "enough at law to sustain a finding of [intentional] discrimination." 509 U.S. at 511 n.4. While such a finding is not *compelled*,[4] these Circuits recognize that it is a question "for the factfinder to answer" whether the employer's assertion of a non-credible reason is a cover-up for illegal discrimination. *Id.* at 523-24.

These Circuits have therefore uniformly held that a Title VII plaintiff can prevail if, together with his *prima facie* case, he shows that the employer's proffered legitimate, non-discriminatory reason for its adverse employment action was simply pretextual. A plaintiff can establish pretext, and thus permit the jury to infer discrimination without additional proof, directly by persuading the trier of fact that a discriminatory reason more likely motivated the employer, **or indirectly by showing that the employer's proffered**

4. The four dissenting Justices in *Hicks* would have gone further and held that rejection of the employer's reasons does not merely permit but *compels* a finding of discrimination. *Hicks*, 509 U.S. at 525-43 (Souter, J., dissenting).

explanation is simply unworthy of belief. *Sheridan v. E.I. DuPont de Nemours & Co.*, 100 F.3d 1061 (3d Cir. 1996) (*en banc*), *cert. denied*, __ U.S. __, 117 S. Ct. 2532 (1997) (plaintiff may succeed in proving pretext and have jury decide ultimate question of liability by persuading jury directly that discriminatory reason more likely motivated employer or indirectly by showing that employer's proffered explanation is unworthy of belief); *Barnett v. Dept. of Veterans Affairs*, 153 F.3d 338, 341-342 and 342 n.4 (6th Cir. 1998) (citing *Hicks*) (rejection of employer's proffered legitimate reason will permit factfinder to infer ultimate fact of intentional discrimination without requirement of additional proof of discrimination); *Ensley-Gaines v. Runyon*, 100 F.3d 1220, 1227 (6th Cir. 1996) (evidence of pretext presented by plaintiff sufficient to permit reasonable factfinder to infer that employer engaged in discriminatory conduct); *Essex v. United Parcel Service, Inc.*, 111 F.3d 1304, 1310 (7th Cir. 1997) (plaintiff can prove pretext either by presenting direct evidence that discriminatory reason motivated employer's decision or by presenting indirect evidence that employer's proffered reason is unworthy of credence, raising inference that real reason is discriminatory); *Edwin v. Hunt Wesson, Inc.*, 150 F.3d 1217, 1222 (9th Cir. 1998) (plaintiff may prove pretext with circumstantial evidence tending to show that employer's proffered motives were not actual motives because they are inconsistent or otherwise not believable); *Nidds v. Schindler Elevator Corp.*, 113 F.3d 912, 918 (9th Cir. 1997) (to establish pretext, plaintiff must provide enough evidence to allow reasonable factfinder to conclude either: (a) that alleged reason for discharge was false; or (b) that the true reason for discharge was discriminatory one); *Roberts v. Roadway Express, Inc.*, 149 F.3d 1098, 1103 (10th Cir. 1998) (*prima facie* case plus indirect showing of retaliation by

demonstrating that employer's asserted reasons for adverse action are unworthy of belief sufficient to establish retaliation); *Randle v. City of Aurora*, 69 F.3d 441, 452-53 n.17 (10th Cir. 1995) ("the *en banc* court has unanimously adopted this panel's holding that a civil rights plaintiff may withstand a motion for summary judgment . . . if [he] establishes a prima facie case and presents evidence that the defendant's proffered nondiscriminatory reason is pretextual — *i.e.*, unworthy of belief");*Combs v. Plantation Patterns*, 106 F.3d 1519, 1538 (11th Cir. 1997) (holding that defendant who puts forward only reasons that are subject to reasonable disbelief in light of evidence faces having its true motive determined by jury, whose factfinding role should not be preempted by court in determining whether to draw inference of intentional discrimination from plaintiff's *prima facie* case taken together with its rejection of employer's proffered explanation for its action);[5] *Aka v. Washington Hospital Center*, 156 F.3d 1284 (D.C. Cir. 1999) (*en banc*) (rejecting any reading of *Hicks* under which employment discrimination plaintiff would be routinely required to submit evidence over and above rebutting employer's stated explanation in order to get to a jury, as such would be inconsistent with *Hicks*, which makes clear that

5. As shown by its opinion in the instant case, the Eleventh Circuit has been, at best, internally split on this issue. *Compare Combs* with *Isenbergh v. Knight-Rider Newspaper Sales, Inc.*, 94 F.3d 436, 444 (11th Cir. 1996) (some cases will require plaintiff to present evidence in addition to *prima facie* case and "disbelievability" of employer's proffered reason for employment discrimination). *Combs* specifically disavowed the prior holding in *Isenbergh*, and the Eleventh Circuit's post-*Combs* decisions have followed the *Combs* analysis. *See, e.g., Bogle v. Orange County Board of County Commissioners*, 162 F.3d 653 (11th Cir. 1998); *Walker v. Mortham*, 158 F.3d 1177 (11th Cir. 1998); *Arrington v. Cobb County*, 139 F.3d 865 (11th Cir. 1998).

"no additional proof of discrimination is required" as a matter of course once a plaintiff has shown that a jury could reject employer's proffered explanation; factfinder's disbelief of reasons put forward by defendant will allow it to infer intentional discrimination).

On the other hand, the First, Second, Fourth, and Eighth Circuits, have, like the Eleventh Circuit in the instant case, affirmatively required a Title VII plaintiff to prove "pretext plus"; that is, in order to prevail, these courts require a Title VII plaintiff to present both evidence of pretext (whether direct or indirect) ***plus*** additional specific evidence that the employer's true motive was discriminatory. This "pretext plus" approach does not permit a trier of fact to infer discrimination from indirect evidence of pretext, such as disbelief of the employer's proffered legitimate business reason, but rather, requires a plaintiff to not only discredit the employer's proffered reason or show that the real reason was more likely discriminatory (plain pretext), but, in addition, affirmatively to produce specific evidence to prove discriminatory animus. *Hidalgo v. Condado Insurance Agencies, Inc.*, 120 F.3d 328, 337 (1st Cir. 1997) (following pure "pretext plus" position, requiring both evidence of pretext and other "significantly probative" evidence of discrimination); *Fisher v. Vassar College*, 114 F.3d 1332, 1343 (2d Cir. 1997) (*en banc*) ("a *prima facie* case plus a finding of pretext is [not] necessarily sufficient to sustain a plaintiff's burden"), *cert. denied*, 118 S. Ct. 851 (1998); *Gillins v. Berkeley Electric Cooperative, Inc.*, 148 F.3d 413, 415-416 (4th Cir. 1998) (once employer comes forward with legitimate reason for adverse employment action, burden shifts back to plaintiff to demonstrate that employer's reason was pretextual **and** motivated in fact by discriminatory purpose); *Vaughan v. Metrahealth Companies, Inc.*, 145 F.3d

197, 202 (4th Cir. 1998) (expressly adopting "pretext plus" approach); *Ryther v. KARE 11*, 108 F.3d 832, 837 (8th Cir. 1997) (*en banc*) (plaintiff's proof of *prima facie* case accompanied by evidence of pretext and disbelief of defendant's proffered explanation may permit jury to find for plaintiff provided that plaintiff still persuades jury from all facts and circumstances that an employment decision was based upon intentional discrimination).

The focus of this Court's opinion in *Hicks*, and the issue on which Petitioner seeks certiorari here, is the plaintiff's ultimate burden of proof following proof of his *prima facie* case and the employer's opposing introduction of a legitimate business reason for its adverse employment action against the plaintiff, which is the employer's medial burden required under the *McDonnell Douglas* analysis. *McDonnell Douglas v. Green*, 411 U.S. 792, 802 (1973). The employer's medial burden was further described by this Court in *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 254-255 and n.8 (1981), where the Court held that the employer, in order to meet its burden, had to clearly set forth, through the introduction of admissible evidence, reasons for its actions which, **if believed by the trier of fact**, would support a finding that unlawful discrimination was not the reason for the adverse employment action. Obviously, the Circuit Courts of Appeals are hopelessly split as to the correct meaning and application of this Court's subsequent decision in *Hicks*, and the type and quantum of evidence which the plaintiff in a Title VII case must produce in order to counter the employer's satisfaction of its medial burden and ultimately prevail. Petitioner here submits that this Court should grant certiorari to definitively resolve this issue, which is a crucial and integral part of a Title VII analysis in an indirect evidence case.

This Court made it clear in *Hicks* that a Title VII plaintiff could defeat the employer's defensive showing by direct evidence, or by inference, such as convincing the trier of fact that the employer's proffered reason is simply unworthy of belief. The trier of fact's rejection of the employer's reason, the Court made clear, could, together with the elements of the plaintiff's *prima facie* case, suffice to permit, although not require, the jury to infer intentional discrimination, requiring no additional proof of discrimination. *Hicks*, *supra*, 509 U.S. at 511. In any event, once the plaintiff has come forward with such evidence, the question is exclusively one for the trier of fact, and not the court. This view is consistent with the Equal Employment Opportunity Commission's enforcement guidance, which states: "a prima facie case, coupled with a non-credible justification from the employer, is sufficient to support a finding of discrimination." EEOC: Enforcement Guidance on *St. Mary's Honor Center v. Hicks*, 8 FEP Manual (BNA) 405:7175, 7175.

Despite this Court's clear language in *Hicks*, the Eleventh Circuit's decision in the instant case held: "[Sullivan] failed to introduce any evidence that would have permitted the jury to legitimately draw the inference that the reasons proffered by Amtrak for Sullivan not getting these jobs were false ***and*** that the real reason was retaliation" (App. A at 12a). In this respect, the instant decision aligns the Eleventh Circuit once again with those circuits requiring a Title VII plaintiff to prove "pretext plus" in order to prevail, and thus deprives the jury of the ability to draw an inference of discrimination from its disbelief of the plaintiff's proffered evidence of pretext.

Those courts which endorse the "pretext plus" approach essentially hold that in some but not all cases, the *prima facie* case **plus** pretext suffices to make a triable issue of discrimination. *See, e.g., Fisher v. Vassar College, supra*, 114 F.3d at 1343; *Rhodes v. Guiberson Oil Tools*, 75 F.3d 989 (5th Cir. 1996) (*en banc*) ("In tandem with a *prima facie* case, the evidence allowing rejection of the employer's proffered reasons will often, perhaps usually [but not always], permit a finding of discrimination without additional evidence.").[6] Presumably, this notion is based on one permissive statement in the *Hicks* decision: "[t]he factfinder's disbelief of the reasons put forward by the defendant . . . may, together with the elements of the prima facie case, suffice to show intentional discrimination." *Id.* (quoting *Hicks, supra*, 509 U.S. at 511). That sentence, standing alone, may indeed be susceptible to such a reading. When the sentence is read in context, however, it can only mean that the trier of fact always may, but never must, draw an inference of illegal discrimination based solely on the *prima facie* case and a finding of pretext. Specifically, immediately after the cited sentence, the Court states, "rejection of the defendant's proffered reasons **will** permit the trier of fact to infer the ultimate fact of intentional discrimination," adding that such rejection "is enough at law to sustain a finding of discrimination." *Hicks, supra*, 509 U.S. at 511 & n.4 (emphasis added and omitted). The Court then continues,

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6. Even the Fifth Circuit has reached a contrary conclusion in its history, holding that a Title VII plaintiff could establish circumstantial evidence of intentional discrimination by demonstrating that employer's proffered legitimate reason was pretextual, either by showing that a discriminatory motive more likely motivated the employer or that the employer's explanation was unworthy of belief. *Harrington v. Harris*, 118 F.3d 359, 367-368 (5th Cir. 1997).

"upon such rejection, '[n]o additional proof of discrimination is required.' " *Id.* at 511 (emphasis omitted). The Court's use of the phrases "will permit" and "is enough at law to sustain," without qualification, coupled with its declaration that "no additional proof of discrimination is required," belies any notion that such evidence will suffice in only certain limited cases.[7]

The proponents of the "pretext plus" approach have also expressed concern that, unless evidence beyond the *prima facie* case and pretext is required, a plaintiff will be able to get to a jury without any evidence that the employer's true reasons were discriminatory. *Fisher v. Vasser College*, 114 F.3d at 1346. In *Fisher*, the Second Circuit suggested that proof that the employer's proffered reason is pretextual is simply one element of the plaintiff's overall burden of proof; he must then come up with additional evidence that the true reason is discriminatory.[8] This suggestion stemmed from the

7. There may be some rare cases where a plaintiff cannot get to the jury despite raising a triable issue of fact as to pretext. Specifically, where unrebutted evidence or an admission by the plaintiff establishes that the decision was based on a third reason, inconsistent with a finding of discrimination, summary judgment might be appropriate. Thus, for example, in *MacDonald v. Eastern Wyoming Mental Health Center*, 941 F.2d 1115, 1121-22 (10th Cir. 1991), the Tenth Circuit granted summary judgment in an age discrimination suit even though the plaintiff's evidence showed that the reasons given for their terminations were pretextual because the complaint itself alleged that the true reason for the terminations was not age but rather the fact that they had spoken out in opposition to the Center's alleged unethical practices. *Id.*

8. A related issue is whether certain types of pretext evidence are "more probative" of discrimination than others. However, no

(Cont'd)

court's fear that because discrimination is only one of many possible reasons why an employer might give false explanations for employment decisions, without "evidence that illegal discrimination is present," a jury could only speculate as to the employer's true motivation.[9]

What the *Fisher* court, the Eleventh Circuit in the case at bar, and the whole "pretext plus" position overlooks is that a jury may always find powerful — even conclusive — evidence that illegal discrimination is present if it finds that the employer gave a false explanation for the challenged employment decision "particularly if disbelief is accompanied by a suspicion of mendacity": in such a case, "no additional proof of discrimination is required." *Hicks*, *supra*, 509 U.S. at 510-511.[10]

(Cont'd)
particular type of evidence is, or should be, required to withstand having the jury's factfinding authority usurped by the court. *See Sheridan*, *supra*, 100 F.3d 1061 (reversing panel decision holding that pretext must be established using one of four types of evidence). The *McDonnell Douglas* framework is based on a recognition that direct evidence of motivation is normally unavailable. Because each case is different, therefore, the plaintiff should be able to rely on *any* evidence which undermines the proffered reason and would permit the trier of fact to conclude that it is unworthy of credence.

9. Indeed, the Eleventh Circuit in the instant case held that the jury's inference of discrimination from the evidence presented was "too speculative" to stand. In determining itself that the evidence did not support such an inference, however, the Eleventh Circuit was itself engaging not only in speculation, but in blatant impermissible substitution of its own credibility determinations from those of the jury.

10. The *Fisher* court recognized that its ruling is at odds with the statement in *Hicks* that "no additional proof of discrimination is required." *See* 114 F.3d at 1343. The court stated, however, that, in
(Cont'd)

As then-Justice Rehnquist has explained, "when all legitimate reasons for rejecting an applicant have been eliminated as possible reasons for the employer's actions, it is *more likely than not* the employer, who we generally assume acts only with some reason, based his decision on an impermissible consideration such as race [or retaliation or gender]." *Furnco Constr. Co. v. Waters*, 438 U.S. 567, 577 (1978) (emphasis added). "If the only reason an employer offers for firing an employee is a lie, the inference that the real reason was a forbidden one, such as age [or gender or retaliation], may rationally be drawn. This is the common sense behind the rule of *McDonnell Douglas*." *Shager v. Upjohn Co.*, 913 F.2d 398, 401 (7th Cir. 1990); *accord Sheridan*, *supra*, 100 F.3d at 1068-72; *Combs*, *supra*, 106 F.3d at 1538 (an employer who puts forward only reasons subject to reasonable disbelief in light of the evidence faces having its true motive determined by the jury, whose province of drawing an inference of discrimination in such circumstances should not have its role usurped by the court). *See also Hicks*, *supra*, 509 U.S. at 511 ("rejection of the defendant's proffered reasons will permit the trier of fact to infer the ultimate fact of intentional discrimination").

(Cont'd)
making this statement, the Supreme Court was referring only to "procedure"; the plaintiff, procedurally, need not produce additional evidence. *See id.* This interpretation makes no sense since the *Hicks* Court was not addressing "procedure" but rather whether a finding of discrimination was compelled or simply permitted by the *prima facie* case and finding of pretext. *See* 509 U.S. at 511. The interpretation also utterly fails to explain the *Hicks* Court's preceding statements that rejection of the employer's reasons "*will* permit" — and "*is* enough at law to sustain" — a finding of discrimination. *Id.* at 511 & n.4 (emphasis added).

The *Hicks* Court thus made clear that, because such an inference is reasonable, a finder of fact may always infer discrimination if it finds the proffered reason unworthy of credence, as it obviously did here.

The Eleventh's Circuit's decision in the instant case completely disregards the fact that the jury rejected Amtrak's proffered reasons for not promoting Sullivan in favor of Sullivan's evidence against that reason, either because the jury found that the real reason was retaliation or because Sullivan's evidence caused them to disbelieve Amtrak's given reason. If the jury disbelieved Amtrak's reason in light of the evidence, it was permitted to draw the inference that Amtrak refused to promote Sullivan to jobs for which he was clearly qualified in retaliation for his having legitimately and in good faith complained about what he perceived as unlawful sexual harassment, in violation of Title VII. In either case, that judgment was solely the province of the jury to make in light of the evidence presented.

CONCLUSION

For the foregoing reasons, Petitioner Barry T. Sullivan respectfully requests that this Honorable Court grant a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit, as such is necessary to resolve the conflict between the Eleventh Circuit's decision in the instant case and this Court's decision in *St. Mary's Honor Center v. Hicks*, as well as the governing decisional law of the Third, Sixth, Seventh, Ninth, and District of Columbia Circuits.

Respectfully submitted,

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